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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIE BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals are reported at 334 F. 2d 488.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (R. 278). On July 17, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including August 18, 1964 (R. 278). The petition was filed on August 18, 1964, and was granted on November 9, 1964 (R. 279). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 29 U.S.C. 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is constitutional.

STATUTES INVOLVED

Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504, provides in pertinent part:

> § 504. *Prohibition against certain persons holding office; violations and penalties.*
>
> (a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *
>
> * * * * * *
>
> during or for five years after the termination of his membership in the Communist Party, or

for five years after such conviction or after the end of such imprisonment * * *.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 U.S.C. 159(h)), which was repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

§ 9(h). *Affidavits showing union's officers free from Communist Party affiliation or belief.*

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sec-

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tion 35A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

Respondent was charged in a one-count indictment returned in the Northern District of California on May 24, 1961, with violation of 29 U.S.C. 504, in that from October 1959 up to and including the date of the indictment he knowingly and willfully served as a member of the Executive Board of Local 10, International Longshoremen's and Warehousemen's Union ("ILWU"), while a member of the Communist Party (R. 1). After trial by jury, respondent was convicted and sentenced to six months' imprisonment. On appeal, the original three-judge panel, *sua sponte*, ordered the case set for reargument before the court *en banc*. The court, by a vote of 5 to 3, ordered the conviction set aside and the indictment dismissed. The court ruled that Section 504, insofar as it relates to members of the Communist Party, is unconstitutional under the First Amendment and under the due process clause of the Fifth Amendment.

Evidence adduced at the trial established that respondent was elected to the Executive Board of Local 10 of the ILWU in the years 1959, 1960, and 1961 (R. 34–35), that he attended thirty-one regular and special meetings of the Board during the indictment period (Gov. Ex. 7; R. 39, 47, 49), and that he took some active part in twenty-one of these meetings (*e.g.*, R. 50–60, 104).

According to the constitution of Local 10 (Gov. Ex. 2), the Executive Board is "the advisory board of the

Local" (Art. XVI, Sec. 10(a)). It consists of officers of the Local and 35 other members (Art. IV, Sec. 2(7); R. 68), and is given the power generally to conduct the Local's business.[1] The Local's secretary-treasurer testified that the usual "channel of procedure" was to funnel the business of the union through the Executive Board, subject to final approval by the members (R. 186).

Witnesses testified that respondent, during a public meeting at Stanford University on May 23, 1960, stated, "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party" (R. 114, 126–128). Another government witness, who had been a member of the Communist Party, testified that she was present at sixteen different Communist Party meetings with respondent during the indictment period (R. 131–134). She fur-

[1] Art. XVI, Sec. 10, enumerates these powers:

* * * They shall have the power to adopt such measures as are deemed necessary from time to time for the good and welfare of the local, subject to the approval of the membership.

(b) The Executive Board shall attend to all matters referred to it by the local, also suggest remedies for immediate and permanent benefit and report to the regular meeting.

(c) They shall have the power to dispose of communications not of interest to the local and cooperate in every way so that the business to be covered at a regular meeting may be accomplished.

(d) In cases of emergency the Executive Board is empowered to act to protect the interests and welfare of the local.

(e) They must study the labor movement closely and formulate concrete policies to strengthen our local—said policies to be in accord with the I.L.W.U.

ther testified that respondent was chairman of the Rules Committee of both sessions of the District Convention of the Communist Party in November 1959 and February 1960 (R. 132, 135); that he was a delegate to the Party's 17th National Convention in San Francisco in late December 1959 (R. 133–134); that he attended and was active at numerous meetings of the District Committee of the Communist Party during 1960 and 1961 (R. 134–135, 136–143); and that he was chairman of a meeting of the Trade Union Commission of the Communist Party in December 1960 (R. 140–144).

Also introduced into evidence was a telegram of October 1, 1959, addressed to Harry Bridges, president of the ILWU, from the then Secretary of Labor, James B. Mitchell. The telegram called Mr. Bridges' attention to Section 504 of the newly enacted Act and set forth that section substantially verbatim. It requested that Mr. Bridges advise whether any ILWU personnel fell within its prohibition (R. 43–44). A reply to this telegram, dated October 9, 1959, respectfully declined to comply with the request (R. 44–46). Subsequently, a letter was sent to all ILWU locals by the secretary-treasurer of the ILWU, enclosing the Mitchell-Bridges correspondence and stating that the ILWU attorneys had advised that any inquiries of local unions similar to Secretary Mitchell's inquiry be transmitted to counsel and the International Union (R. 46–47).

The evidence also showed that at a caucus of the delegates from the Northern California District to the

17th National Convention of the Communist Party in New York City, respondent was nominated for the office of national committeeman representing the Northern California District (R. 144). The Chairman of the Northern California District, who was presiding at the caucus, stated that he felt that it would be unwise for respondent to accept that nomination because respondent had been elected to an office in his union as a possible test case for the Landrum-Griffin Bill (R. 144). Respondent replied that "this was true and that he felt it was far more important that he continue with that activity rather than accept nomination for the national committee, because he had been elected to the office with the understanding of the leadership of his union" (R. 144).

SUMMARY OF ARGUMENT

This case concerns the constitutionality of the provision of 29 U.S.C. 504 which makes it a criminally punishable offense for a member of the Communist Party to serve in any of an enumerated list of leadership positions in a labor organization. This provision was enacted in 1959 as a substitute for Section 9(h) of the National Labor Relations Act (as amended by the Labor Management Relations Act of 1947), which had conditioned a union's access to the National Labor Relations Board on the filing of non-Communist affidavits by all the union's officers. Section 9(h) which, like the challenged provision in this case, was intended to eliminate Communist Party members from leadership position in the labor movement, was

sustained by this Court against a constitutional challenge in *American Communications Association v. Douds*, 339 U.S. 382. The constitutional principles underlying the *Douds* decision apply to the provision involved in this case, and those principles are still valid today.

The Court held in *Douds* that Congress could permissibly exercise its interstate commerce power to eliminate the danger of "political strikes" by keeping from union leadership the class of persons who would be likely to engage in such disruptive activity—*i.e.*, those whose allegiance is to a cause which seeks the overthrow of the government by force and violence. It observed that Section 9(h) had an indirect effect on freedom of association in that it discouraged lawful membership in the Communist Party, but it upheld the statute notwithstanding this incidental effect on First Amendment liberties.

Section 504, like Section 9(h), does not directly restrict speech or association but touches these constitutionally protected liberties only conditionally. Its primary concern is conduct—serving in union offices—which, if committed by individuals responsive to the directions of a foreign-dominated power, presents a grave threat to our national economy. To the extent that the challenged provision has an impact on speech or association, it affects relatively few individuals and restricts them only conditionally, *i.e.*, only if they retain their union offices. On the other hand, the statute preserves the integrity of labor unions,

which, under the National Labor Relations Act and its amendments, have been delegated quasi-governmental powers over their members. It also shields interstate commerce from the crippling effect of "political strikes" which serve no legitimate purpose and which benefit only the world Communist movement. Those results could not be achieved by any less "drastic" means than the kind of statute represented by Section 504 and its predecessor, Section 9(h).

In enacting Section 504 Congress had before it not only the results of the investigations conducted prior to the enactment of Section 9(h), which established the danger of political strikes, but also the fruit of legislative investigations subsequent to 1947. These inquiries showed that Communist infiltration into the labor movement had not ceased with the enactment of Section 9(h) but was a continuing menace.

The investigations, as well as the history of the administration of Section 9(h), also demonstrated that there were significant flaws in the remedy provided by Section 9(h), which produced inequitable results. The affidavit provision was resented by union officials; it created serious administrative burdens; it did not effectively prevent Communists from assuming union office; and the criminal sanction for false filing was inadequate to deter the submission of untruthful statements. Even more serious was the unfairness of the indirect "discouragement" which Section 9(h) imposed. By being denied access to the

National Labor Relations Board, innocent union members were forced to suffer for their officers' refusal to file the required affidavits, and the indirect remedy put the power to enforce Section 9(h) in the hands of employers rather than in the hands of the government. The challenged provision in this case was enacted as a more fair and reasonable method of achieving the desired result.

The court of appeals erred in concluding that Section 504 was more severe than Section 9(h). The history of Section 9(h)'s administration discloses that the success of nearly all major unions depended upon access to the National Labor Relations Board. Hence freedom of lawful association with the Communist Party was not promoted by giving a union the option of retaining a Communist officer and relinquishing access to the Board. The practicable course (and that taken by many members of the Communist Party who wished to retain union office) was to file false non-Communist affidavits. This left the members open to criminal prosecution under 18 U.S.C. 1001—a consequence which is almost identical to the remedy provided in Section 504(b).

ARGUMENT

In *American Communications Association* v. *Douds*, 339 U.S. 382, this Court sustained the constitutionality of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 61 Stat. 146, which conditioned the right of a union to use the facilities of the National Labor

Relations Board upon the filing of affidavits by the union's officers attesting that they are not members of or affiliated with the Communist Party (pp. 3–4, *supra*). In enacting the Labor-Management Reporting and Disclosure Act of 1959, Congress repealed Section 9(h) and, in order to achieve the same result as Section 9(h) was intended to produce, substituted for that statute the provision which is under constitutional attack in this case.[2] We submit, for reasons stated fully below, that the constitutional principles set forth in the *Douds* decision are still valid and applicable to this case; that the threat of political strikes and other improper disruptions of interstate commerce, which prompted the enactment of Section 9(h) in 1947, also warranted the enactment of a similar protective measure in 1959; that the law then enacted—29 U.S.C. 504—remedied many of the inequities and administrative difficulties of Section 9(h) which emerged during the twelve years of its enforcement, while achieving much the same practical result as Section 9(h); and that none of the differences between Section 9(h) and Section 504 justifies a finding that the latter is unconstitutional.

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[2] The only provision involved in this case is that part of Section 504 which prohibits a *current* member of the Communist Party from holding union office. Different questions would be presented, of course, in a case in which a person who had resigned from the Communist Party within five years prior to his election was convicted under Section 504. When we speak of "Section 504" throughout this brief, we refer only to that portion of it which prohibits *simultaneous* membership in the Communist Party and service in any of the enumerated union positions.

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I

CONGRESS MAY, CONSISTENTLY WITH THE FIRST AMENDMENT, ENACT A STATUTE AIMED AT KEEPING MEMBERS OF THE COMMUNIST PARTY FROM POSITIONS OF POWER IN THE LABOR MOVEMENT

A. THE CONSTITUTIONAL PRINCIPLES OF *AMERICAN COMMUNICATIONS ASSOCIATION* V. *DOUDS* APPLY TO THIS CASE

In 1950 this Court, by a vote of five-to-one (with three Justices not participating), sustained the constitutionality of Section 9(h) of the National Labor Relations Act (as amended by the Labor-Management Relations Act of 1947) insofar as it required all officers of unions seeking to use the facilities of the National Labor Relations Board to file affidavits stating that they were not members of or affiliated with the Communist Party.[3] *American Communications Association* v. *Douds*, 339 U.S. 382. See also *Osman* v. *Douds*, 339 U.S. 846. The *Douds* decision was based on the stated propositions (1) that "Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives * * * but to make them a device by which commerce and industry might

[3] A severable provision of Section 9(h) also required each affiant to state "that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." This provision, which has no counterpart in the statute here in question, was the basis of the partial dissents in *Douds* by Justices Frankfurter and Jackson.

be disrupted when the dictates of political policy required such action" (339 U.S. at 389); (2) that "Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and * * * that the remedy provided by § 9(h) bears reasonable relation to the evil which the statute was designed to reach" (339 U.S. at 390–391); (3) that "Section 9(h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again" (339 U.S. at 396); (4) that "[w]hen particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented" (339 U.S. at 399); (5) that "the public interest in the good faith exercise of [union] power is very great," while the effect of Section 9(h) on the rights of speech and assembly is only an indirect "discouragement" (339 U.S. at 402); (6) that "[t]he 'discouragements' of § 9(h) proceed, not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country" and it "leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of

the public by members of the described groups" (339 U.S. 403–404); and (7) that "Congress should not be powerless to remove the threat [of political strikes], not limited to punishing the act" (339 U.S. at 406).

These principles are, we submit, entirely sound, and they are as applicable to the present case as they were to *Douds*. As the legislative history of Section 504 conclusively demonstrates (pp. 36–40, *infra*), it was enacted in 1959 to meet the very same problem that moved Congress to pass Section 9(h) in 1947. This Court observed in another decision involving Section 9(h) that the purpose of that statute was "to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.'" *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 325. Section 504, on its face, carries out this purpose, and it obviously does so much more directly than did its predecessor.

Reserving for a later section of our argument an analysis of the particular distinguishing characteristics between Section 9(h) and Section 504 which impelled the Court of Appeals for the Ninth Circuit to hold that the latter statute is unconstitutional (see pp. 41–47, *infra*), we submit that insofar as Section 504 singles out Communist Party members and bars them from positions of power in labor unions it is a permissible regulation of interstate commerce, and does not violate the First or Fifth Amendment. This conclusion is supported by the constitutional princi-

ples articulated in *Douds* and confirmed by subsequent decisions.

First, it is clear that Congress' concern that Communist union officers may call political strikes—based on substantial legislative inquiry before the passage of Section 9(h) in 1947 and Section 504 in 1959 (see pp. 24–28, 36–40, *infra*)—comes well within Congress' regulatory power over interstate commerce. In the absence of any countervailing constitutional right, it would be entirely within Congress' discretion to choose the means whereby to prevent the unjustified disruption of commerce caused by political strikes, just as it is within Congress' power to determine how to deal with other kinds of interference with interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, No. 515, this Term, decided December 14, 1964, p. 20. If, as Congress has determined, the danger of political strikes and other forms of labor unrest inconsistent with the national labor policy is substantially increased when members of the Communist Party occupy positions of control in labor organizations, it is a permissible exercise of the commerce power for Congress to take appropriate steps to eliminate this danger.

Second, the challenged provision in this case, like the statute in *Douds*, is designed not to restrain the dissemination of ideas by Communist Party members or even to reduce membership in or affiliation with the Communist Party; it is aimed only at preventing persons who are members of the Communist Party from assuming positions wherein they may exercise powers

which endanger the national economy. In other words, Section 504 is a prophylactic measure directed at preventing future conduct, not at punishing past speech or deterring prospective association. The most that can be said against it is that the conduct at which it is aimed is "intertwined with expression and association"—a characteristic which does not make it immune from regulation. *Cox* v. *Louisiana,* No. 49, this Term, decided January 18, 1965. Since its primary thrust is not at First Amendment liberties as such, Section 504 (like Section 9(h)) is entitled to be tested under a different standard of constitutionality from statutes which attempt directly to control speech or association. This distinction, fully articulated in the *Douds* opinion (339 U.S. at 396), has been subsequently approved by this Court in *Dennis* v. *United States,* 341 U.S. 494, 502–511, and in *Speiser* v. *Randall,* 357 U.S. 513, 527, where, in speaking of cases like *Douds,* the Court said:

> In these cases, * * * there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the *Douds* case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective

> other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

See also *Konigsberg* v. *State Bar*, 366 U.S. 36, 50–51, 54.

Third, since one of the components in the applicable test of constitutionality is the seriousness of the incidental impact which the statute has on First Amendment liberties, it is important to observe that in this case, as in *Douds*, the sum total of the harmful effect of the regulation is that it "results in an indirect, conditional, partial abridgment of speech." 339 U.S. at 399. Section 504, like Section 9(h), "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." 339 U.S. at 404. It also permits those few who are affected to maintain their affiliations and beliefs subject only to the loss of positions "which Congress has concluded are being abused to the injury of the public by members of the described groups." *Ibid.* Cf. *United States* v. *Har-*

riss, 347 U.S. 612, 625–626; *Lathrop* v. *Donohue,* 367 U.S. 820, 842–844.

Fourth, any assessment of the evil at which Section 504 (like Section 9(h)) was directed must be based not only on the concrete facts regarding the threat to interstate commerce presented by Communist control of labor unions which were developed during legislative investigations and other studies (pp. 24–28, *infra*), but also on the substantial authority which Congress has delegated to labor organizations by virtue of the National Labor Relations Act and its subsequent amendments. Having "seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents" (*Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 202), it was surely within Congress' power to conclude that it was then necessary, just as it might be if a quasi-legislative body were actually involved (see *Gerende* v. *Board of Supervisors,* 341 U.S. 56), "to protect the * * * service by establishing an employment qualification of loyalty to the State and the United States. * * * [Such a qualification would be] reasonably designed to protect the integrity and competency of the service." *Garner* v. *Los Angeles Board,* 341 U.S. 716, 721. Labor unions are not mere voluntary associations to be left to their own devices. They occupy a unique position under this country's national labor policy, and their activities are subject to a full network of federal regulation which includes restrictions on the eligibility of candidates for union office (other than the one involved in this case) and the manner in which elections and other ballots are to be held.

29 U.S.C. 411, 481–483, 504; see *Calhoon* v. *Harvey*, No. 17, this Term, decided December 7, 1964; *American Federation of Musicians* v. *Wittstein*, No. 27, this Term, decided December 7, 1964.[4] It is certainly appropriate therefore, for Congress to protect these vessels of national economic policy against possible misuse by those who would employ them to serve the political ends of a foreign power which seeks to achieve worldwide domination. Today, even more than when *Douds* was decided, is the "authority [of labor organizations] derive[d] in part from Government's thumb on the scales," and now, at least as much as a decade and a half ago, can it be said that "the public interest in the good faith exercise of that power is very great." 339 U.S. at 401–402.

Fifth, since an essential element of the test of constitutionality in this area is whether "less drastic means for achieving the same basic purpose" are

[4] Section 2(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401(a), states the underlying legislative finding:

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

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available (*Shelton* v. *Tucker*, 364 U.S. 479, 488; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512–513), it is relevant to inquire whether other courses could have been chosen by Congress to achieve the end towards which Section 9(h) and Section 504 are directed. We respond to the claim that Section 504 is unconstitutional because it is assertedly more "drastic" than Section 9(h)—the basis for the court of appeals' conclusion—at pp. 41–45, *infra*. The further argument that either remedy is inappropriate because Congress could have dealt with political strikes simply by prohibiting them under pain of criminal penalty was squarely answered by this Court in *Douds* (339 U.S. at 406): "The fact that the injury to interstate commerce would be an accomplished fact before any sanctions could be applied, the possibility that a large number of such strikes might be called at a time of external or internal crisis, and the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that Congress should not be powerless to remove the threat, not limited to punishing the act."

Nor can it be said here, as it was in *Aptheker* v. *Secretary of State*, 378 U.S. 500, that the statute "sweeps too widely and too indiscriminately across the liberty guaranteed * * *." 378 U.S. at 514. Apart from the fact that the "liberty" involved in *Aptheker* was not the freedom of association which a passport applicant had exercised in the past by joining a Communist-action organization but the right to travel

which was being denied when he could not obtain a passport (whereas the right to be a union officer—the parallel prospective right being asserted here—is not a constitutionally protected "liberty"), there are major differences of scope between the passport restriction of the Subversive Activities Control Act on the one hand and Section 9(h) and Section 504 on the other: The former covers individuals who do not know that the group of which they are members is a Communist-action group (378 U.S. at 509–510); the latter are limited to members of the Communist Party itself. While the former effectively prohibits foreign travel regardless of its purpose and the sensitivity of the area to which travel is sought (378 U.S. at 511–512), the latter are confined to a much more particularized kind of conduct—neither union membership nor any type of employment other than as an officer or policy-making employee of a union is prohibited. Hence Sections 9(h) and 504 "are more discriminately tailored to the constitutional liberties of individuals" (378 U.S. at 514) than the passport restriction both in terms of the individuals covered by the statute and in terms of the activity foreclosed to the defined class.

It is true that one of the vices of the statute held unconstitutional on its face in *Aptheker* was that it rendered "irrelevant the member's degree of activity in the organization and his commitment to its purpose" (378 U.S. at 510), and the challenged provision in this case is similar, in that respect, to the statute involved in *Aptheker*. But the significance of this generalization surely depends on the statutory context in which it is found. With the statute involved in

Aptheker, Congress wished to restrict the freedom of Communist agents to travel abroad and act as couriers for ventures in espionage or sabotage. This Court held that the same result could have been achieved if, in the passport screening process—as in federal employment—membership in a Communist-action group would be "one factor to be weighed" (378 U.S. at 513) rather than an absolute disqualification. In determining whether or not to issue a passport under such a hypothetical standard, the Secretary of State might then consider "the member's degree of activity in the oganization and his commitment to its purpose."

But there is no similar administrative process whereby candidates for union office are evaluated and their qualifications approved. Hence the statute itself must incorporate a definite standard whereby the legality of future conduct can be determined. In light of the otherwise narrow compass of the statute and the fact that the threatened danger may be presented even by persons whose membership in the Communist Party falls short of the active and knowing participation required to violate the "membership clause" of the Smith Act (see, *e.g., Noto* v. *United States,* 367 U.S. 290), Congress was certainly warranted in drawing the line at Communist Party membership, regardless of the particular member's activity or commitment. Moreover, here, as in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100–101, where a similar contention was made and rejected, what Congress may have feared was "the cumulative

effect" which a contrary rule might have. If, for example, it were permissible for inactive or less-than-fully committed Communist Party members to become union officers, the combination of two or more such persons in power in any particular labor union might reinforce the views of each and thereby produce the very evil which Congress sought to prevent.

In summary, we submit that the principles applied in *Douds* to sustain Section 9(h) are valid today and warrant rejection of respondent's claim that Section 504 infringes on protected First Amendment liberties. And once the incidental impact of Section 504 on freedom of association is held to be constitutionally permissible, the provision amounts to nothing more than another federal regulation against conduct which gives rise to a conflict of interest in an area which is legitimately of federal concern. See the statutes cited in Judge Chambers' dissenting opinion in this case (R. 277). In *Board of Governors* v. *Agnew*, 329 U.S. 441, for example, this Court applied a statute which authorizes the Board of Governors of the Federal Reserve System to order the removal of an officer, director or employee of a member bank who is simultaneously a partner or employee of a partnership engaged principally in the underwriting of securities. The statute involved in *Agnew* provides a criminal sanction against the offending individual's retention of such dual capacity just as Section 504 does, even though that sanction (unlike Section 504) does not take effect until after the removal order is disobeyed.

B. LEGISLATIVE INVESTIGATIONS AND OTHER EVIDENCE SUPPORTED CONGRESS' DECISION IN 1959 THAT A SUBSTANTIAL THREAT TO THE ECONOMY WAS PRESENTED BY COMMUNIST INFILTRATION OF LABOR ORGANIZATIONS

In the *Douds* decision this Court observed that Congress had before it, as a basis for its enactment of Section 9(h), "[s]ubstantial amounts of evidence * * * that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government." 339 U.S. at 388–389. When it enacted Section 504 in 1959, Congress had not only the information obtained prior to the 1947 legislation but also further evidence pertaining to the same subject which was produced at hearings after Section 9(h) was enacted. See Hearings before a Special Subcommittee of the House Committee on Education and Labor, *Investigation of Communist Influence in the Bucyrus-Erie Strike,* 80th Cong., 2d Sess. (1948); Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security,* 82d Cong., 2d Sess. (1952); Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary, *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers,* 82d Cong., 2d Sess. (1952); Hearings before Permanent Subcommittee on Investigations of the Senate Committee on

Government Operations, *Communist Infiltration in Defense Plants,* 84th Cong., 1st Sess. (1955); Hearings before the House Committee on Un-American Activities, *Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area,* 86th Cong., 1st Sess. (1959).

The later hearings produced evidence such as that given by an F.B.I. undercover informant who testified to conversations he had had with an official of the International Union of Mine, Mill, and Smelter Workers in 1950. The official, alleged to have been a member of the Communist Party, said that Communists within the union were making efforts "to see that a strike was called in the copper industry * * * to cut down production of copper for the Korean war effort." Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary, *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers,* 82d Cong., 2d Sess. (1952), p. 193. The union's vice-president subsequently testified before the subcommittee that strikes were called in 1950, but he denied that they were "directed" by the Communist Party. *Id.* at 245.

On the basis of this kind of testimony, Congressional investigating committees concluded that Communist infiltration of labor organizations was a continuing danger. In a 1953 report, for example, the Subcommittee on Labor and Labor Management Rela-

tions of the Senate Committee on Labor and Public Welfare concluded (*Public Policy and Communist Domination of Certain Unions,* S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 24–25):

> (2) Communist-dominated unions are clearly identifiable as such because of the positive correlation of their policies with the shifting phases of the foreign policy of the Soviet Union.
>
> (3) The affirmative evidence of direct action by Communist-dominated unions in support of Soviet Russian foreign policy is less conclusive but the potentialities of such direct action are visible.
>
> (4) There is credible evidence that the correlation noted above is not coincidence but the direct outcome of direction by Communist Party functionaries.
>
> * * * * *
>
> (6) Communist-dominated unions are still operating in defense production, although in diminished strength. The existence of a few Communist-dominated unions in key industries may in times of war or threatened war constitute a real danger to the safety of the country. Espionage might be practiced through communications and sabotage be committed in the electrical, mining and smelting, and longshore industries. We should not blink our eyes to these dangers.

The evidence heard by the Congressional committees and the conclusions they reached on the basis of this evidence more than adequately sustained Congress'

determination in 1959 to provide a "direct" remedy for the threat to the national economy presented by Communist domination of labor unions. The need for such legislation in 1959 was surely no less than the need in 1947.

Nor was concern over Communist infiltration into labor organizations limited to Congressional committees. In 1949 and 1950 the Congress of Industrial Organizations expelled eleven unions—among which were the International Union of Mine, Mill and Smelter Workers and the International Longshoremen's and Warehousemen's Union (which is involved in this case)[5]—because of their Communist domination. The reasons for the expulsion of these unions and the danger they posed to organized labor are spelled out in the *Official Reports on the Expulsion of Communist Dominated Organizations from the CIO,* compiled by the Publicity Department, CIO Publication No. 254 (Sept. 1954), and we have reproduced substantial excerpts from this document in our brief in *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board,* No. 44, this Term, Appendix B, pp. 210–219. The basis for fearing political strikes or other disruptive activity inimical to the interests of this country from Com-

[5] The other nine unions were: United Electrical, Radio & Machine Workers; Farm Equipment Workers; American Communications Association; Food, Tobacco, Agricultural & Allied Workers Union of America; International Fishermen & Allied Workers of America; International Fur & Leather Workers Union; National Union of Marine Cooks & Stewards; United Office & Professional Workers of America; United Public Workers of America.

munist-dominated unions was summarized in the *CIO-Reports* (p. 13) as follows:

> The Communist Party is precisely this type of organization which the CIO is under a constitutional mandate to oppose—one which would use power to exploit the people for the benefit of an alien loyalty. The Communist Party speaks in the words of unionism and Americanism. But actually it matters not to the Communist Party whether a particular policy will advance or hinder the best interests of American labor. The sole test is whether the policy is required by the need of the Soviet Union. Only to the extent that the Soviet line permits will the propaganda mill of the Communist Party grind out platforms which are in consonance with the ideals of American labor. In event of conflict, however, between the needs of the Soviet Union and the best interests of American labor, the former must always prevail.

The danger to the national economy presented by these unions and other nonaffiliated Communist-dominated labor organizations could not, of course, be eliminated simply by expulsion from the CIO. Governmental action was necessary.

II

SECTION 504 IS A CONSTITUTIONAL SUBSTITUTE FOR SECTION 9(h)

The court of appeals held that the challenged provision is unconstitutional, not because it suffers from some infirmity which will also invalidate a statute like Section 9(h), but because, unlike Section 9(h), it is "far broader than the threat it is designed to meet"

and is, therefore, "unreasonably broad" (R. 259). This conclusion rests on the premise that Section 9(h) is, at least, a preferable means of achieving the legislative purpose and that it is a "less drastic" measure than Section 504. We submit, for reasons stated below, that not only could Congress reasonably prefer the approach taken by Section 504 (which is the appropriate test of constitutionality), but that this approach is, in fact, demonstrably sounder. And as for the assertedly "drastic" nature of Section 504, we show that its effect on the First Amendment liberties allegedly abridged is not significantly greater than the effect of Section 9(h). Accordingly, the decision in *American Communications Association* v. *Douds*, 339 U.S. 382, controls this case and requires that the judgment of the court of appeals be reversed.

A. SECTION 504 INCORPORATES A DEMONSTRABLY SOUNDER LEGISLATIVE APPROACH THAN SECTION 9(h)

It is clear that Congress' purpose in enacting Section 9(h) and Section 504 was to eliminate the threat of Communist-controlled political strikes by "'wholly eradicat[ing] and bar[ring] from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.'" *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 341 U.S. 322, 325. Section 9(h) was structured to achieve this result not by a direct prohibition addressed to Communist Party members and to union leaders but by indirect "discouragements." By requiring all union officers to file non-Communist affidavits and then denying the facilities of the National Labor Relations Board to unions whose officers

had not filed the affidavits, Congress sought to apply the squeeze on union members in the expectation that potential Communist officers would feel the pinch. Section 504, on the other hand, announced a "flat prohibition" (R. 258).

The court of appeals' conclusion that the latter is "unreasonably broad" while the former is permissible must proceed from the premise that Section 9(h) is a more reasonable means of achieving the intended result. Surely the fact that one regulation assertedly results in a lesser abridgement of First Amendment liberties than another (but see pp. 41–45, *infra*) is not alone enough to characterize the greater abridgement as "unreasonable." One must also consider whether the narrower restriction would be, in fact, adequate to meet the anticipated evil and whether its other consequences (apart from the effect on constitutional liberties) would be unfair, unworkable or oppressive. Otherwise Congress would be deprived of its well-recognized legislative prerogative to choose the appropriate means for dealing with a public evil in light of the many factors comprising the public interest.

A comparison of the remedies provided by Sections 9(h) and 504 demonstrates that rather than being "unreasonably broad," the latter provision is more appropriately and fairly calculated to achieve the legislative purpose. The following are several of the shortcomings of Section 9(h) which were cured by Section 504:

1. *The affidavit requirement was considered offensive and prompted principled non-compliance.*—Sec-

tion 9(h) was an affront to the labor movement. It singled union officials out of the entire community and required them to swear that they were loyal. Mr. Justice Jackson, concurring and dissenting in *Douds* (see note 3, *supra*), voiced the objections of many labor leaders when he said (339 U.S. at 434–435):

> I am aware that the oath is resented by many labor leaders of unquestioned loyalty and above suspicion of Communist connections, indeed by some who have themselves taken bold and difficult steps to rid the labor movement of Communists. I suppose no one likes to be compelled to exonerate himself from connections he has never acquired.

The resentment had an effect on the administration of Section 9(h).[6] Certain labor leaders—notably those in the United Mine Workers of America—refused to submit the required affidavits at any time during the 15-year life of Section 9(h). As a result, their unions were deprived of the facilities of the National Labor Relations Board even though there was no suspicion of Communist influence.

2. *The affidavit requirement created serious administrative burdens.*—Section 9(h)'s comprehensive affi-

[6] In order to remove the affront it was even suggested that employers—*i.e.*, officers of corporations subject to the National Labor Relations Act—be required to file similar affidavits. See *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 24, 30; 1 Legislative History of the Labor-Management Reporting and Disclosure Act (hereinafter Leg. Hist. LMRDA) (1959), p. 366.

davit obligation posed obvious administrative difficulties for the Board. The total number of affidavits on file at any given time often exceeded 200,000 (*e.g.*, *Public Policy and Communist Domination of Certain Unions,* S. Doc. No. 26, 83d Cong., 1st Sess. (1953), p. 5), and it was necessary for the Board to keep the records current by requesting new affidavits whenever a union election occurred or whenever the affidavits on file were more than twelve months old. Since compliance would have to be established before the issuance of a complaint by the Board, the Board had the difficult administrative task of keeping up-to-the-minute records on each union which could appear before it.

3. *The affidavit requirement did not stop Communists from assuming positions of leadership in labor unions.*—The Senate Subcommittee on Labor and Labor-Management Relations observed in 1953 that the effectiveness of Section 9(h) was substantially impaired by the fact that "well known Communist party followers signed the affidavits when they realized that it would be impossible for the unions to function without access to Board proceedings." *Public Policy and Communist Domination of Certain Unions, S. Doc.* No. 26, 83d Cong., 1st Sess. (1953), p. 6; see *id.* at 24. The only remedy available against these individuals was to prosecute them under 18 U.S.C. 1001 (*Leedom* v. *International Union of Mine, Mill & Smelter Workers,* 352 U.S. 145) for having submitted false sworn statements. Hence the effect of Section 9(h) under

these circumstances was to transform the intended restriction against Communists in union leadership positions into criminal charges under 18 U.S.C. 1001—an obviously inappropriate transposition.[7]

4. *The truth of the affidavits could not be adequately policed under 18 U.S. 1001.*—Prosecutions under 18 U.S.C. 1001 encountered serious obstacles for the reason given by the then Attorney General in a 1951 letter to the Chairman of the Senate Labor and Public Welfare Committee:[8]

> Difficulty is experienced in the maintenance of prosecutions under this section because of the necessity of proving that an affiant at the time of the making of his affidavit was a member of the Communist Party or affiliated with the Party, or that he then believed in or was a member of or a supporter of an organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Testifying before the Senate Subcommittee of the Committee on Labor and Public Welfare in 1952, a

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[7] There were several successful prosecutions under the false-statements statute. See *Fisher* v. *United States*, 231 F. 2d 99 (C.A. 9); *Bryson* v. *United States*, 238 F. 2d 657 (C.A. 9); *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953; *Lohman* v. *United States*, 266 F. 2d 951 (C.A. 6), certiorari denied, 361 U.S. 923; *West* v. *United States*, 274 F. 2d 885 (C.A. 6), certiorari denied *sub nom. Haug et ux.* v. *United States*, 365 U.S. 811; cf. *Killian* v. *United States*, 368 U.S. 231; *Travis* v. *United States*, 364 U.S. 631.

[8] Quoted in Shair, *One More Year With 9(h)*, 3 Lab. L.J. 35, 38 (1952); see N.Y. Times, July 1, 1951, p. 17, col. 3.

representative of the Department of Justice offered a similar explanation:[9]

> Because of this requirement that the affidavit be couched in the present tense, a prosecution can be undertaken with some hope of obtaining a conviction only where it is possible to prove that on the very day the affidavit was executed the affiant was a member of the Communist Party, or affiliated therewith or was engaged in other proscribed conduct or mental processes. It is a simple matter for an individual to discontinue, formally, the prohibited membership, affiliation, and conduct and execute the prescribed affidavit on the next day and thus circumvent the law.

During hearings conducted in 1959 before the House Un-American Activities Committee in Chicago, union officials who had been identified as Communist Party members testified that Communist Party members had signed non-Communist affidavits after merely nominal resignation from the Communist Party.[10]

5. *Denial of Board facilities to unions was an inequitable remedy.*—Section 9(h)'s indirect "discouragement" is to deny the facilities of the Board to a union whose officer has not filed the required affidavit. This remedy is inequitable because it wreaks retribu-

[9] Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess. (1952), p. 54.

[10] See Hearings before the House Committee on Un-American Activities, *Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area*, 86th Cong., 1st Sess. (1959), pp. 519, 576.

tion on innocent union members for the misconduct of a single officer. "The section as written and as interpreted has the effect of depriving entire groups of workers of valuable economic privileges if an individual officer decides not to file affidavits, either because he cannot without risking prosecution or because he will not for reasons of principle." Morgan, *The Supreme Court and the Non-Communist Affidavit,* 10 Lab. L. J. 28, 43; see Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 Harv. L. Rev. 1, 35 n. 148 (1947).

6. *Denial of Board facilities to unions left enforcement of Section 9(h) in the hands of the employer.*— Section 9(h) did not prohibit employers from bargaining collectively with non-complying unions; it merely denied such unions access to the Board to enforce their rights against employers. Consequently, an employer could, if he chose, use a union's non-compliance as a devastating weapon to deny it recognition and to refuse to bargain with it. But if the union was strong, or if the employer favored it, he could sign a collective-bargaining agreement with it. The result was, in the words of the executive vice-president of the CIO, that Section 9(h) "place[d] in the hands of the employer, rather than of the Government, the decision of whether a particular union is to be penalized for Communist leadership." Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security,* 82d Cong., 2d Sess. (1952), pp. 273–274.

7. *Denial of Board facilities resulted in delay and confusion.*—Since compliance with Section 9(h) was a condition precedent to the filing of a complaint by the Board on a union's behalf, the delays caused by negligent failure to comply or by the fact that filed affidavits had become outdated resulted in delayed processing of a union's charges. The effect of this was to penalize union members even when there was no suggestion whatever of any Communist participation in the affairs of the union.

8. *Denial of Board facilities created tensions within a union.*—Since Section 9(h) penalized the entire union for the conduct of a single officer or for the action of a voting majority in electing that officer, its tendency was to create dissension within such a union and possibly to produce the very kind of disruption of commerce which the statute was designed to prevent. It has been observed that the statute had this effect on the Electrical Workers organization. See Daykin, *The Operation of the Taft-Hartley Act's Non-Communist Provisions*, 36 Iowa L. Rev. 607, 627 (1951).

The above shortcomings and inequities of Section 9(h) are all attributable to its affidavit requirement or to the remedy it provides—*i.e.*, denial of access to facilities of the National Labor Relations Board. Neither of those features is found in Section 504.

When Congress undertook in 1959 to re-examine various aspects of the National Labor Relations Act, as amended, its first reported version of what ultimately became the Labor-Management Reporting and

Disclosure Act (S. 1555, 86th Cong., 1st Sess.) eliminated the sanction of Section 9(h). Speaking generally of denying access to the Board as a means of coercing compliance with various other reporting requirements, the Senate Committee report stated (S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 9; 1 Leg. Hist. LMRDA 405):

> To deny a union access to the National Labor Relations Board because its officers did not file a proper report is unwise for four reasons. First, it would be ineffective in the case of strong unions not dependent upon NLRB facilities; second, it is unfair to the members who have done no wrong but who would suffer both the denial of information and loss of NLRB protection; third, the rights and duties created by the National Labor Relations Act exist for the benefit of the public, and such legal obligations should be enforced equally in all cases, not traded off against one another as a system of rewards and punishments; and, finally, experience with a similar provision in the present law clearly demonstrates that conditioning the use of the NLRB processes on compliance with not wholly related requirements such as this can result in frustrating the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient, and expeditious manner.

Hence the proposed bill substituted "a positive obligation to make full and accurate reports, subject to criminal penalties" (*ibid.*) for the conditional obligation previously imposed by Sections 9(f) and 9(g).

The bill would have substituted for Section 9(h) an obligation, resting on both union officers and employers, to file non-Communist affidavits. The obligation would have been enforced by the general criminal provision governing any willful violation or failure to comply with the provisions of the statute (Section 108(a), S. 1555, 86th Cong., 1st Sess.; 1 Leg. Hist. LMRDA 357) and by subsequent disqualification from service as a union officer (Section 305(b), S. 1555, 86th Cong., 1st Sess.; 1 Leg. Hist. LMRDA 380).[11]

The Committee Report accompanying the bill explained that one of the guiding principles followed by the draftsmen of the legislation was (S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 7; 1 Leg. Hist. LMRDA 403):

> 3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The Committee rejects the notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. * * *
>
> The committee does not believe that the record demonstrates that the imposition of indirect sanctions, such as penalizing the union and its members for malpractices of its officers, would be effective in insuring compliance. Moreover, on the basis of information available to this

[11] An exception was included for unions which did not use the facilities of the Board for a one-year period prior to the date on which the affidavit was due.

> committee, it is clear that the requirements of present law with respect to the filing of financial and other data have hampered the administration of the National Labor Relations Act, have disrupted labor-management relations and have been expensive to administer.

With respect to Section 9(h), the Committee noted several advantages over the then-existing law (S. Rep. 187, *supra,* at 35; 1 Leg. Hist. LMRDA 431):

> First, the non-Communist oaths submitted under section 122 of the bill would be subject to the full investigatory power of the Secretary and to the criminal penalties imposed for false filing, thus strengthening the effectiveness of existing provisions of law. Second, under these procedures there would be no question of the appearance of official governmental approval of a union because of a filing of an affidavit by an officer which is the case today. Third, by taking the filing requirement out of the machinery for settling labor management [disputes, the] NLRB would be relieved of a substantial administrative burden and a significant cause of delay in case handling would be eliminated.

The Committee explained this concluding reason as follows (S. Rep. 187, *supra,* at 35–36):

> Finally, the committee believes that conditioning use of Board facilities on the filing of non-Communist affidavits has not been a satisfactory procedure. It has complicated and delayed the processing of cases before the Board and has had no material effect on improving safeguards against Communist infiltration.

The bill passed the Senate with these provisions. See 1 Leg. Hist. LMRDA 537, 545–546, 563. The House of Representatives, however, dropped the non-Communist affidavit requirement completely and substituted what is now Section 504. The Report of the House Committee on Education and Labor on H.R. 8342, the bill in which Section 504 first appeared in its present form, stated that this section had been adopted "as a more effective restriction against Communist infiltration of labor organizations than is contained in subsection (h) of section 9 of the National Labor Relations Act, as amended." H. Rep. No. 741, 86th Cong., 1st Sess. (1959), p. 33; 1 Leg. Hist. LMRDA 791. The House version was agreed upon at conference with one addition (see H. Rep. No. 1147, 86th Cong., 1st Sess. (1959), p. 36; 1 Leg. Hist. LMRDA 940), and it was enacted into law.

The above analysis and legislative history demonstrate that the two basic changes from the approach taken by Section 9(h) to that taken by Section 504—*i.e.*, from an affidavit requirement to a "flat prohibition" and from the indirect remedy of denying the union facilities of the Board to the direct remedy of a criminal penalty against the offending officer—are deeply rooted in reason and in sound policy judgments. Rather than transforming the statute into an "unreasonably broad" provision (as the court of appeals believed), the 1959 enactment substituted a rational and enforceable statutory command for a circuitous and unworkable procedure which produced inequitable results.

B. SECTION 504 IS NOT A MORE "DRASTIC" ABRIDGMENT OF FREEDOM OF ASSOCIATION THAN SECTION 9(h)

The court of appeals held that Section 504 is unconstitutional because it exceeds Section 9(h) in "the quality of the restraint" (R. 257) on freedom of association and in "the force with which [the restraint] is applied" (R. 258). These distinctions between the statutes were held to affect the constitutionality of the 1959 enactment presumably because they significantly increased the restrictive effect which the applicable law imposed on First Amendment liberties. A closer analysis of the effect of the changes produced by the enactment of Section 504 demonstrates, we submit, that it did not substantially alter the incidental abridgment on free association which accompanied the predecessor statute and which was held to be constitutionally permissible by this Court in *Douds*.

1. In condemning the "quality of the restraint"—*i.e.*, the fact that Section 504 addresses its sanction "directly upon the individual" in the form of a "flat prohibition" (R. 258) rather than to the union which he represents—the court of appeals has, as we have shown (pp. 34–36, *supra*), mistaken a virtue for a vice. Apart from the administrative problems created by the affidavit requirement, it was certainly appropriate for Congress to transfer the burden of the consequences of a union official's refusal to comply with the statute from the members of his union to the official himself. By directing the sanction at the official personally, Congress has aimed the pressure of the statute at the source of the evil, and not at innocent third parties.

Equally significant is the fact that such a "direct" sanction does not really have a substantially greater impact on First Amendment liberties than the indirect "discouragement" of Section 9(h). The history of Section 9(h)'s administration has shown that most major unions are unable to function without the access to National Labor Relations Board facilities which is provided by the federal labor laws. Consequently, all but two of the major unions in the country [12] ultimately complied with the Section 9(h) affidavit requirement by the time of Section 504's enactment in 1959.[13] As Congress found well before 1959, union officers who were members of the Communist Party were instructed to file false non-Communist affidavits and to risk the possibility of discovery and prosecution under 18 U.S.C. 1001.[14] Several such persons

[12] The two exceptions were the International Typographical Union (AFL-CIO) and the United Mine Workers of America.

[13] The compliance records of the National Labor Relations Board show, for example, that whereas 15,678 local unions had complied with the requirements of Sections 9(f), (g) and (h) in June 1951, this number increased to 19,614 in March 1954 and to 22,405 by March 1957.

[14] The committee report accompanying S. 1555 stated:

> The assumption upon which the present non-Communist affidavit requirement was based is that officers of unions who were Communists would not file affidavits. This assumption, on the basis of the record, has not proved sound. As the Department of Justice indicated to the committee, the Communist Party after passage of the non-Communist affidavit requirement "instructed its members who were union officers to file affidavits and to continue their party membership on a secret basis." Indeed, the record clearly demonstrates that the officers of unions alleged to be Com-

were, in fact, successfully prosecuted under 18 U.S.C. 1001. See cases cited in note 7, *supra*. Hence the restrictive effect of Section 504 was no more serious than that of Section 9(h). For if, as the compliance records demonstrate, a union did not really have the practical alternative of doing without Board remedies and electing Communist Party members to union office, a Communist Party member who wished to become a union officer was as fully denied the right to retain Communist Party membership as if a "flat prohibition" or statute applicable "directly upon the individual" were on the books. His only other choice was to retain Communist Party membership and submit a false affidavit—a course which would subject him to the risk of a criminal prosecution in which the issue would be—just as the issue is under Section 504—whether he was simultaneously a member of the Communist Party and an officer of the union (*i.e.*, at the time when the affidavit was executed).

2. This demonstrates, as well, that the court of appeals' second ground for concluding that Section 504 was more "drastic"—that it differed in "the force with which [the restraint] is applied" in that it operated "with the duress of criminal sanctions" (R. 258, 259) is also insubstantial. The practical consequences

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munist infiltrated have been most punctilious about filing non-Communist affidavits. * * *

S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 35; 1 Leg. Hist. LMRDA 431. See also *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 6–7, 24.

of Section 9(h) were, as we have shown, to make 18 U.S.C. 1001 the only effective deterrent. Prospective union officers who wished to associate with the Communist Party could not realistically weigh the non-criminal consequences of retention of such membership; it was just practically unfeasible for a union—particularly a small or weak one—to expect to be successful if it was denied access to the Board. Hence the non-criminal aspect of Section 9(h)'s sanction could simply be taken as an absolute bar. The only real choice remaining was to conceal Communist Party membership, file a false affidavit, and risk the possibility of criminal prosecution. That choice—without the affidavit requirement—is equally available under Section 504.

Moreover, it seems entirely clear that the criminal nature of the sanction does not really exert more "force" than if the remedy were civil. If, for example, Congress substituted for subsection (b) of Section 504 (p. 3, *supra*) a provision authorizing the Secretary of Labor to obtain injunctions against service by any Communist Party member in any of the capacities enumerated in subsection (a), the effect of the statute would be the same notwithstanding the absence of any criminal sanction. An individual in respondent's position could be enjoined and, if he were to disobey the injunction, criminal contempt proceedings might ensue. The prohibition would be equally absolute, and the "discouragement" for all but secret Communist Party members would be as effective as any criminal penalty. This is because the extent of abridgment of freedom of expression by laws such as Section 504 or Section 9(h) cannot

be measured simply by whether the statute is criminal or civil, or by whether it falls into one or another broad category of statutory measures. See Freund, *The Supreme Court and Civil Liberties,* 4 Vand. L. Rev. 533, 537–539 (1951).

Nor does the criminal sanction of Section 504 warrant the court of appeals' further suggestion that the statute would violate the Fifth Amendment if it were not "restricted to party members harboring specific intent to use union office to interrupt interstate commerce or actively and purposefully participating in furtherance of illegal party activities aimed at overthrow of the Government" (R. 261). Unlike *Scales* v. *United States,* 367 U.S. 203, and *Noto* v. *United States,* 367 U.S. 290, this case does not involve a criminal prosecution based solely on membership in the Communist Party; the offense in this case was committed when respondent combined his Communist Party membership "with occupancy of a position of great power over the economy of the country." *American Communications Association* v. *Douds,* 339 U.S. 382, 403–404. As we have previously observed (pp. 15–16, *supra*), this case—unlike *Scales* and *Noto*—involves a restraint primarily upon conduct, not upon speech or advocacy. It is intended to deter individuals from combining positions which create "tempting opportunities" (*Board of Governors* v. *Agnew,* 329 U.S. 441, 449) to perform acts inconsistent with the national labor policy. At most, it is a regulation of "conduct * * * intertwined with expression and association" (*Cox* v. *Louisiana,* No. 49, this Term, decided January 18, 1965) and thus distinguishable from regulations of speech as such. Mr. Justice

Jackson, concurring and dissenting in *Douds*, clearly stated the reasons which distinguish this type of statute from the type of statute involved in *Scales* and *Noto* (339 U.S. at 434):

> Counsel stress that this is a civil-rights or a free-speech or a free-press case. But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any aboveboard activity normal in party struggles under our political system. It may continue to nominate candidates, hold meetings, conduct campaigns and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the Party. No one is penalized for writing or speaking in favor of the Party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with, the Communist Party. It applies only to one who becomes an officer of a labor union.[15]

When a law is directed at advocacy alone—as in the "membership clause" of the Smith Act—it may be constitutional only if the defendant's membership in the proscribed organization is such as to involve him actively and knowingly in its illegal endeavors. Otherwise, there is a substantial danger that persons who are engaged in constitutionally protected activity may be swept in under the criminal prohibition. But when the purpose of the law is to prevent conduct

[15] Section 504 does "forbid" a member of the Communist Party from becoming a union leader, but in this regard it merely carries into effect the purpose of the statute. Consequently, this prohibition is not an added deterrent to free association.

which gives rise to conflicts of interest and membership in a proscribed organization is only one element of the offense, there is no such danger. Congress may then draw its net more broadly to bring within the first element of the offense all those who, according to objective and readily-determined criteria, are likely to present the danger.[16]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1965.

[16] There is no merit to respondent's contention—rejected by a majority of the court of appeals—that it was error for the district court to take from the jury the question whether the executive board of his local was the kind of executive board to which Section 504 applies. Even accepting respondent's version of the facts, the board to which he belonged qualified under the statute since it was authorized to act in cases of emergency and had other directorial functions. See note 1, *supra*. Under these circumstances, it was proper for the court to tell the jury what the law was as applied to this case (*Horning* v. *District of Columbia*, 254 U.S. 135), so long as it left to the jury, as it did (R. 233–241), the ultimate fact-finding of guilt or innocence.

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